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No. 73-683

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

BRASWELL MOTOR FREIGHT LINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Prior to July 1, 1957, petitioner had no assets and remained dormant except for participation in proceedings before the Interstate Commerce Commission looking toward the acquisition of motor carrier properties and operations. On July 1, 1957, petitioner acquired the stock of the Hall Company ("Hall"), which incurred a substantial net operating loss for the period July 1, 1957 to December 31, 1957. The Hall Company reported this loss on its separate return for the calendar year 1957. For later years, Hall and petitioner filed consolidated returns upon which Hall's 1957 loss was carried over and deducted from Hall's own income. In 1964, Hall Company merged with the petitioner. As of the merger, the unused portion of Hall's loss carryover was $153,890 (Pet. App. 23-24).

Petitioner's sole contention here, rejected by both courts below, is that it was entitled to carry over the unused portion of Hall's 1957 loss to be applied against its own income for 1964. Such a deduction is specifically foreclosed by Treas. Reg. §1.1502-31A (b)(3)(*b*) (Pet. App. 31-32), which provides that an operating loss of a corporation which was reported on a separate return may be carried over to a year in which the corporation is a member of an affiliated group filing a consolidated return only if, on each day of the year in which the loss was incurred, the corporation which incurred the loss was already a member of the affiliated group. Since Hall did not become affiliated with petitioner before July 1, 1957, it was affiliated during only one half of its taxable year 1957. The unused portion of its 1957 loss is therefore not available to offset petitioner's 1964 income.

1. Petitioner argues (Pet. 9-15) that the applicable Regulation is contrary to the intent of Congress. But Section 1502 of the Code gives the Commissioner broad authority to "prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making a consolidated return and of each corporation in the group * * * may be returned * * * in such manner as clearly to reflect the income-tax liability * * *." This Court has held that such legislative regulations have the force and effect of law. *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90, 99-103; *Maryland Casualty Co.* v. *United States*, 251 U.S. 342, 349. See also *Regal, Inc.* v. *Commissioner*, 53 T.C. 261, affirmed *per curiam*, 435 F. 2d 922 (C.A. 2).

Moreover, pursuant to Section 1501 (Pet. App. 30), affiliated corporations which elect the privilege of filing consolidated returns are thereby deemed to have consented to all the conditions of the Regulations issued by the Commissioner. Surely the requirement of the Regulations challenged by petitioner—that the corporations be affiliated on each day of the year in which the loss was incurred—is a reasonable limitation upon the benefits of filing consolidated returns.[1]

2. Petitioner further argues (Pet. 18-19) that because Hall did not earn any income between January 1, 1957 and June 30, 1957, its affiliation with petitioner as of July 1 was in effect for each day of that taxable year. But Hall's existence during the entire calendar year cannot be ignored. As prescribed by its by-laws, the calendar year 1957 was its taxable year. Pursuant to Treas. Reg. §§ 1.443-1(a) and 1.6012-2(a) (Pet. App. 35-36), a taxable year depends on a corporation's existence and not upon whether it has any taxable income or even any gross income. Moreover, under this Court's decision in *Moline Properties* v. *Commissioner,* 319 U.S. 436, 438-439, Hall's participation in Interstate Commerce Commission proceedings

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[1] Prior to the adoption of the Regulations involved here by T.D. 6813, 1965-1 Cum. Bull. 436, the Regulations had prohibited the loss carryover if the affiliated corporations had filed separate returns for the year in which the loss was incurred. Treas. Reg. §1.1502-31A(b)(3), as amended by T.D. 6674, 1963-2 Cum. Bull. 392, 397. This requirement would have also denied the deduction. The applicable Regulation here is the product of a 1965 retroactive amendment which liberalized the flat prohibition against availability of the loss carryover. It kept, however, the unitary concept of the prior Regulations by the requirement of affiliation on each day of the year of the loss for which separate returns had been filed.

in early 1957 with respect to the sale of its stock constituted sufficient business activity to classify it as a separate taxable entity for that entire year.[2]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

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[2] The fact that Hall was a separate taxable entity effectively refutes petitioner's contention (Pet. 15-16) that it is entitled to the loss because it financed the operations of Hall.

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